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COURT OF CRIMINAL APPEALS  
1/5/2021  
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**PD-0724-20 and PD-0725-20**  
In the Court of Criminal Appeals of Texas  
At Austin

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**Nos. 01-20-00004-CR and 01-20-00005-CR**  
In the Court of Appeals  
For the First District of Texas  
At Houston

—————◆—————  
**Nos. 1657519 and 1657521**  
In the 338<sup>th</sup> District Court  
Of Harris County, Texas

—————◆—————  
***Ex parte Joseph Gomez***  
*Appellant*

—————◆—————  
**State's Post-Submission Brief**  
**Responding to Appellants Letters of Supplemental Authority**

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**There is no distinction between “bail” and “bond” in Article 17.09. The different terms there and in other parts of the Code of Criminal Procedure are largely an artifact of old terminology.**

At oral argument and in two post-submission letters of supplemental authority, the appellant has maintained there is a substantive difference between “bail” and “bond” as those terms are used in Article 17.09. The appellant argues that bail is an abstract number set by the first magistrate to see the case, and bond is the actual security the defendant gives to meet that number. Thus, the appellant argues, when Article 17.09 Section 3 allows the trial court to require the defendant to obtain a second “bond” if it determines the current “bond” is insufficient in amount, the only question before the trial court is whether the bond meets the amount of bail. That was the basis for the First Court’s ruling.

It’s true the Code of Criminal Procedure uses the words “bail” and “bond” in confusing ways; sometimes it seems that there’s a distinction, sometimes it doesn’t. After more research, the State believes this is an artifact of a shift in terminology with the 1965 recodification of the Code of Criminal Procedure. Understanding this shift in terminology shows that the distinction the appellant draws between bail and bond in Article 17.09 does not exist.

Before 1965, the Code of Criminal Procedure divided bail into two categories: bail bonds and recognizances. Bail bonds then were nearly identical to bail bonds now; recognizances were similar to personal bonds in the current Code, though they were unsigned and involved sureties. TEX. CODE CRIM. PROC. art. 268 (1925).

The Code made clear that for procedural purposes all these terms were more or less interchangeable:

**What “bail” includes** - Whenever the word “bail” is used with reference to the security given by the defendant, it is intended to apply as well to recognizances and bail bonds. When a defendant is said to be “on bail” or to have “given bail,” it is intended to apply as well to recognizances as to bail bonds.

TEX. CODE CRIM. PROC. art 271 (1925).

In his Fourth Supplemental Letter (Dec. 23), the appellant cited a 1907 law—which, by the 1925 Code, was Article 287—requiring magistrates to “set the amount of bail.” The appellant ascribed import to this phrasing, but the Code made clear any reference to “bail” was a reference to the actual security the judge ordered posted, whether a bail bond or a recognizance. The provision the appellant cites, along with Article 271, supports the State’s position: Bail is the actual security, not a theoretical number. *See* TEX. CODE CRIM. PROC. art. 267

(1925) (“‘Bail’ is the security given by the accused that he will appear and answer before the proper court...”).

This was the structure of the Code when the Legislature passed Article 275a in 1957. Whereas new Article 17.09 uses the term “bail” in Section 2, and the term “bond” in Section 3, old Article 275a used the same terms for both sections:

Sec. 2. When a defendant has once given **a bail bond or entered into a recognizance** for his appearance in answer to a criminal charge, he shall not be required **to give another bond nor enter into another recognizance** in the course of the same criminal action except as here in provide.

Sec. 3. Provided that whenever, during the course of the action, the judge or magistrate in whose court such action is pending finds that **the bond or recognizance** is defective, excessive or insufficient in amount, or that the sureties are not acceptable, or for any other good and sufficient cause, such judge or magistrate may, either in termtime or in vacation, order the accused to be rearrested, and require the accused **to give another bond or enter into another recognizance**, in such amount as the judge or magistrate may deem proper. When **such bond is so given and approved or when such recognizance is entered into**, the defendant shall be released from custody.

TEX. CODE CRIM. PROC. art. 275a (Vernon’s 1958 Supplement) (emphasis added).<sup>1</sup>

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<sup>1</sup> The 1958 supplement is available as a pdf from the State Law Library: <http://www.sll.texas.gov/library-resources/collections/historical-texas-statutes/>.

Why then, does new Article 17.09 use different terms in those sections? Writing for the bar journal about changes in the 1965 Code, soon-to-be Judge Onion described Article 17.09 as a carryover of Article 275a and did not mention the different wording. *See* John F. Onion Jr., Commentary on the Revised Code of Criminal Procedure, 28 TEX. B.J. 727, 795 (1965)(describing role of Article 17.09 in new Code without mentioning any bail/bond distinction).<sup>2</sup>

It seems likely it is the result of a change in terminology in the 1965 Code that blurred any remaining distinction between “bail” and “bond.” “Recognizances” were replaced with personal bonds. *Id.* at 794 (describing personal bonds as “an innovation in the new Code,” and noting “Throughout Chapter 17 the old term ‘recognizance’ has been deleted inasmuch as it is but one specie of bail.”). Before 1965 a reference to a “bond” would have meant only a bail bond, but under the 1965 Code the security given for both types of pretrial release—the type where you actually give money and the type where you promise to give money—were called “bonds.”

Rather than carry over Article 271—titled “What ‘bail’ includes”—as a standalone article, the Legislature added a clause to the

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<sup>2</sup> The State Bar provides members online access to the Bar Journal archives: [https://www.texasbar.com/AM/Template.cfm?Section=Search\\_TBJ\\_Archives](https://www.texasbar.com/AM/Template.cfm?Section=Search_TBJ_Archives).

definition of “bail” stating it “includes a bail bond or a personal bond.” TEX. CODE CRIM. PROC. art. 17.01; *cf.* TEX. CODE CRIM. PROC. art. 267 (1925). Adding this clause at the same time it deleted Article 271 strongly suggests the Legislature intended the clause to serve the same purpose as Article 271. At any rate, on its face it does: The term “bail” includes “bond.”

At oral argument and in his supplemental letters the appellant has struggled mightily to disconnect “bail” and “bond” because that’s the only way to justify the First Court’s holding. But that disconnect has no basis in the current Code or in the Code as it existed when Article 275a was passed. Were this Court to judicially create a distinction between “bail” and “bond,” it would give this appellant a win, but it would complicate all future efforts to understand the bail process in Texas.

This Court should stick to the statutes we have been given. The term “bail” includes “bond.” There is no bail that is not a bond, thus the bond is the bail. When a trial court is assessing whether the “bond” is insufficient in amount, it is necessarily assessing whether the “bail” is insufficient in amount. It would be impossible to find the “bond” insufficient without also finding the “bail” insufficient, because they are

the same thing. The appellant's argument that Article 17.09 Section 3 allows the trial court to assess the sufficiency of "bond" but not the sufficiency of the "bail" is a creative effort to win this case, but ultimately makes no sense.

### **Conclusion**

The State asks this Court to reverse the First Court and reinstate the trial court's judgment. Alternatively, this Court should reverse the First Court and remand the case to that court to address the appellant's remaining point.

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